

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**ASSOCIATION OF COMMUNITY)
ORGANIZATIONS FOR REFORM)
NOW, et al.,)
)
Plaintiffs,)
)
v.)
)
CATHY COX, et al.,)
)
Defendants.)**

**CIVIL ACTION NO.
1:06-CV-1891-JTC**

**REPLY BRIEF IN SUPPORT OF
DEFENDANTS’ MOTION TO COMPEL
AND IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR PROTECTIVE ORDER**

It is fundamental that parties are entitled to discovery regarding another party’s claims and to gather evidence in support of their own. Defendants’ written discovery in this case speaks for itself: contrary to the Plaintiffs’ assertions (who neither quote it nor address it specifically), it is narrowly tailored to the Plaintiffs’ and Defendants’ assertions. Below Defendants take up Plaintiff’s assertions one by one, quoting them where appropriate in bold single space, and addressing them.

**RESPONSE TO ASSERTIONS BY PLAINITFFS IN THEIR
“INTRODUCTION AND BACKGROUND”**

Plaintiffs’ assertion: **“Plaintiffs noted in their proposed preliminary report**

and discovery plan, filed in November 2006, that most, if not all, of the relevant discovery in this case had already taken place in connection with the preliminary injunction proceedings.” (Plaintiffs’ brief at p. 3.)

Plaintiffs’ assertion is flatly erroneous. The discovery that took place prior to the preliminary injunction was *de minimis*. The record shows:

- Plaintiffs opposed Defendants taking *any* discovery prior to the preliminary injunction hearing. [Dkt. 8 at p. 3 n.2; dkt 15; dkt. 44 at p. 36 (where, in addition, Plaintiffs counsel stated, “If the Defendants feel like they need discovery and a full hearing on the merits, they would still have the opportunity for that, even after the entry of a preliminary injunction.”).]
- Plaintiffs refused to compromise, despite the Courts’ direction that they do so, on a discovery schedule at that time. [*Id.*; *see* dkt. 10.]
- Prior to the preliminary injunction hearing the Court expressly limited Defendants to two (2) depositions. [Dkt. 16.] There are four Plaintiffs in the case and many more than four affiants (in addition to other witnesses).
- The Defendants were permitted no written discovery prior to the preliminary injunction hearing. [*See* dkt. 16.] All of the discovery issues now before the Court involve written discovery. [Dkt. 66, p. 2.]
- The order permitting the two depositions allowed nine business days for those depositions to be taken. [Dkt. 16.] Yet, it also required Defendants to

file a brief on the merits (which relied on those depositions) within four days of the order. *Id.* Since the purpose of the depositions was use in the brief, Defendants necessarily completed the depositions within the four days.

Thus, almost no discovery – and no written discovery -- occurred prior to the preliminary injunction proceeding. Discovery is and always has been proper in this case.

Plaintiffs' assertion: **“Defendants apparently mistook the Court’s evidentiary findings as a veiled invitation to them to try to find additional evidence to submit in support of the Regulation, rather than as a definitive ruling on the adequacy of the State’s claimed justifications for enacting the Regulation.”** (Plaintiffs’ brief at p. 3, n 2.)

The preliminary injunction hearing is obviously not a “definitive ruling on the adequacy of the State’s claimed justifications for enacting the Regulation.” It is a *preliminary* injunction, not a *final* injunction. Plaintiffs have no basis, in law or fact, to claim they have a “definitive ruling.” *Cf. Swanson v. Worley*, no. 06-13643, 2007 U.S. App. LEXIS 15519 (11th Cir. June 29, 2007) (Eleventh Circuit affirms trial court denial of final injunction, although the trial court had granted a preliminary injunction).

Plaintiffs' assertion: **“Plaintiffs consented to allow Defendants time to conduct discovery [supposedly to avoid dispute as to the discovery period].”** (Plaintiffs’ brief at p. 4.)

What Plaintiffs exactly mean here is unclear, but it never happened in the

context in the brief where Plaintiffs assert it.

Plaintiffs' assertion: **“Defendants have sought to turn this case from a simple challenge to an election regulation into a full frontal assault on third-party voter registration groups.”** (Plaintiffs' brief at p. 4.)

This is incorrect. Defendants' discovery (which Plaintiffs never quote) focuses on the assertions of the Plaintiffs in this case and Defendants' defenses. For example, among many other things the Plaintiffs have asserted, they have repeatedly claimed they have reliable procedures governing their voter registration practices and handling of applications. [*See, e.g.*, dkt. 1 p. 9; dkt. 2 (brief at pp. 4-9); dkt. 41 (transcript at pp. 39-44).] Plaintiffs brought their registration activities and “quality control procedures” and their efficacy into issue. There is no “attack” discovery on the Plaintiffs; there is proper discovery regarding Plaintiffs' conduct.

Plaintiffs' assertion: **“Defendants have even sought discovery on meritless and unfounded allegations of alleged voter registration fraud and identity theft by some of the Plaintiffs and/or employees of Plaintiffs that have arisen in other states and that have nothing to do with the copying and sealing of voter registration applications.”** (Plaintiffs' brief at p. 4.)

Plaintiffs brought into question their conduct in other states: again, they have asserted, referring to and relying on conduct in States other than Georgia, they have reliable and proper procedures for handling voter registration applications.

[*See, e.g.*, dkt. 1 p. 9; dkt. 2 (brief at pp. 4-9); dkt. 41 (transcript at pp. 39-44).]

Defendants believe the evidence will show exactly the contrary: that Plaintiffs have

an extraordinary history of misconduct in Georgia and throughout the United States. This evidence not only directly refutes Plaintiffs' assertions, however. It also supports Defendants' assertion that private registration groups cannot and should not be permitted to take the private and sensitive information on voter registration forms without any oversight whatsoever. It supports the not only reasonable (which is what the law requires), but compelling basis for the regulation at issue. Defendants are entitled to take discovery on Plaintiffs' assertions.

Plaintiffs' assertion: **"... given Defendants' admissions that they had no basis for enacting the Regulation in the first place"** (Plaintiffs' brief at p. 5.)

At all times Defendants have asserted they have and had not only a reasonable but compelling basis for enacting the regulation. (*See, e.g.*, Defendants' brief opposing the motion for preliminary injunction detailing these at length.) There is no basis for Plaintiffs' assertion, above.

RESPONSE TO ASSERTIONS BY PLAINTIFFS IN THEIR "ARGUMENT AND CITATION OF AUTHORITY"

A. Plaintiffs' Arguments Regarding Timing.

Plaintiffs' assertion: **"Plaintiffs are quite surprised to see Defendants argue that Plaintiffs have waived their objections by not responding to discovery in a timely manner."** (Plaintiffs' brief at p. 6.)

Plaintiffs were informed of this assertion by letter, then via email, then on the phone well before the motion to compel was filed. This is documented in the

certificate by Defendants' counsel. The Court should note there is no certificate by Plaintiffs' counsel supporting any of their discovery assertions.

Plaintiffs' assertion: **"Defendants' requests were originally served via mail on January 12, 2007."** (Plaintiffs' brief at p. 6.)

The relevant discovery requests were served via hand. [Dkt. 56; dkt. 67.]

Plaintiffs' assertion: **"On February 14, 2007, Defendants' counsel responded via email and specifically consented to an extension"**

This is incorrect. Note Plaintiffs cite no support for this assertion.

Plaintiffs' assertion: **"Defendants' counsel replied via email and said he would prefer to have the responses and any responsive documents hand-delivered by March 27, 2007"** (Plaintiffs' brief at p. 7.)

This is (most kindly to the Plaintiffs) inaccurate. Defendants' counsel expressly conditioned any extension on the production of all responsive documents by March 27, 2007. (*See* Certificate of Defendants' counsel.) There is no dispute that Plaintiffs produced no documents by hand (or, indeed, at all) on this date.

Plaintiffs' assertion: **"[S]ince they had objected to producing any additional documents, [Plaintiffs] elected to save the time and expense of hand-delivery"** (Plaintiffs' brief at p. 7.)

It is true that Plaintiffs responded on March 27 by making blanket objections to all of Defendants' requests for documents, and made specific objections to almost all of them. An extension for such objections was never agreed to: the forty (40) day extension Plaintiffs sought was the time they said they needed to assemble

the documents. It is, frankly, mind boggling, that Plaintiffs would claim now they needed (and obtained) 40 additional days to object to all the requests and produce no documents.¹ Plaintiffs objections to all the discovery after 40 additional days violated the letter and spirit of the extension.

It is also plain that Plaintiffs had no intent to live up to their agreement on production. For example, in response to request for production of documents 4 to the Georgia Coalition for the People's Agenda ("GCPA"), no specific objections were made. Instead Plaintiffs said:

Subject to and without waiver of the foregoing General Objections, Plaintiff states to the extent such non-privileged documents exist and are in the possession, custody, and control of Plaintiff, said documents will be produced for inspection and copying at a time and place mutually convenient to the parties.

[Dkt. 71.] Of course, no such documents were ever produced, even out of time.

B. Discovery Regarding Standing

Plaintiffs' assertion: "**Plaintiffs' Standing to Sue is Already Clear From the Record, and No Additional Discovery is Needed on This Question.**" (Plaintiffs' brief at p. 8)

Defendants are entitled to call standing into question and to conduct good

¹ Although it was not discussed, Defendants' counsel would nonetheless have honored any proper basis to withhold some documents, if, for example, they involved attorney-client communications or the like. Defendants have not sought

faith discovery on the question. And that is what Defendants have done, no more.

And standing is plainly one of the issues in this case. For example, at one of the two depositions Defendants were permitted prior to the preliminary injunction hearing, ACORN's 30(b)(6) representative admitted that ACORN had not engaged in voter registration activities in Georgia since November 2004. Since the regulation in question was not enacted until the fall of 2006, and not effective until 2007, it may seriously be question whether the lead Plaintiff has any injury-in-fact from a regulation that has not applied to it.

Project Vote offered none of its own Georgia registration conduct (rather it implied that it relies on ACORN to follow its policies, *see* Dkt. pp.) making its standing (and testimony about what it does) questionable. Likewise, whether the Georgia NAACP or GACP have standing is in issue since their conduct which may never have been contrary to the regulation to start with nor is it now.

But Defendants cannot simply assume an absence of standing any more than they are required take the Plaintiffs' assertions that they have standing on faith. It is a subject for discovery.

The standing requirements in federal cases are well known. They require,

to use waiver as a weapon, but it is plain that Plaintiffs violated the spirit and letter of any extension.

even in injunction cases, an “injury-in-fact.” While there is a long history of cases applying the rule, we can turn to the most recent cases to see it applied. In *Hein v. Freedom from Religion Found.*, no. 06-157, 2007 U.S. LEXIS 8512 (decided June 25, 2007), the Supreme Court held that the A.C.L.U. lacked standing to challenge expenditures of the White House Office of Faith Based and Community initiatives, reversing the Seventh Circuit. The Court discusses standing rules in detail in the context of an injunction action, and holds *inter alia* that standing rules are especially important where the plaintiff (who there asserted generalized standing as citizens and taxpayers) “seek ‘to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.’” 2007 U.S. LEXIS at *22 (internal cite omitted).

Similarly, on July 6, 2007, the Sixth Circuit issued its decision in the *ACLU v. National Security Agency*, nos. 06-2095/2140 (6th Cir. July 6, 2007), holding that the ACLU lacked standing to challenge (and seek a permanent injunction against) the Terrorist Surveillance Program. In a 35 page slip opinion (recommended for publication by the court), the court recounts the law governing standing and concludes that it makes the case unjusticiable.

It is hard to distinguish the plaintiffs in those cases (and many others) from the Plaintiffs in the present case. But the Defendants have not presented a standing

argument to the Court yet (they have asserted it in their answer), and it is possible they might not. The question right now is discovery. And the Defendants are entitled to engage in discovery that relates to whether Plaintiffs have standing.

C. Plaintiffs' Associational Rights Do Not Excuse Them from Their Discovery Obligations.

Plaintiffs' assertion: "**Defendants' Expansive and Overreaching Requests for Information Relating to Plaintiffs' Internal Associational Activities Infringe Upon Plaintiffs' First Amendment Associational Privileges.**" (Plaintiffs' brief at p. 12.)

Defendants have served no interrogatories or requests for production of documents as to how Plaintiffs conduct their business except as to voter registration, which is the subject of Plaintiffs' Complaint. [*See* dkt. 1, dkt. 67.] Defendants have not asked how Plaintiffs associate with their members, although Plaintiffs made claims regarding this and the Court relied on Plaintiffs' assertions. [Dkt. 1 at pp. 6, 8, 20-22; dkt. 41 at pp. 23-27 (testimony).] Indeed, one of Plaintiffs' two counts expressly makes allegations regarding their associational rights. [Dkt. 1 at pp. 20-22.] Nonetheless, Defendants have not made discovery regarding Plaintiffs' associational activities. And, without any possible dispute, Defendants, specifically, have not sought membership lists. [*See* dkt. 67.]

What the Plaintiffs rely upon in claiming they are not subject to discovery are a series of cases holding that membership lists were not discoverable. *See, e.g.,*

NAACP v. Alabama, 357 U.S. 449 (1958); dkt 71 (ACORN's response to Request 1 to ACORN, citing cases). The rule of these cases arose from the civil rights era when the production of membership lists were sought to intimidate the groups in question. *NAACP, infra.*; see also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). The membership lists were not germane to anything else, and the attempt to obtain them – and the initiation of the litigation – usually came from the officials seeking them. *Id.*

Since that time, in case after case, the courts have rejected application of this rule when the discovery relates to issues properly before the court. See *United States v. Mayer*, no. 06-50481, 2007 U.S. App. LEXIS 14469 (9th Cir. June 6, 2007); *Anderson v. Hale*, 49 Fed. R. Serv. 3d (Callaghan) 364 (E.D. Mich 2001); *In re: the Matter to Quash Roberts Grand Jury Subpoena*, 650 F. Supp. 159 (N.D. Ga. 1987) (Judge Evans); *Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987); *United States v. Apker*, 705 F.2d 293 (8th Cir. 1984); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); see also *Eastland v. United States Srvcmn's Fund*, 421 U.S. 491, 498 (1975) (the rule exists to protect individuals from having their associational interests exposed). All of the above cases involve attempts to get membership lists and direct impact on associational rights. Again, in the present case there is no discovery regarding membership lists. The Defendants, in fact,

have avoided associational discovery altogether (although they are likely entitled to it, given the associational claims).

Significantly, in a former Fifth Circuit case binding on this Court, *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir. 1982), the court upheld discovery from Georgia in which information and lists were sought of persons with whom a religious organization had transacted business. The court stated:

Ambassador College also raises the claim that first amendment associational rights are infringed by the Georgia court order. In support of this position, the appellant cites *Gibson v. Florida Legislative Investigation Committee*, [cite];; and *NAACP v. Alabama*, [cite]. These cases are readily distinguishable. They all involved governmental investigation into the NAACP, the goal of which was to obtain membership lists. Given the political climate of those times, the information obtained would probably have been used to "chill" membership in the organization. We are not faced with this sort of scenario in the instant case. The appellees are seeking, *inter alia*, a list of persons who have donated land to Ambassador College. This information is relevant, as it could lead to information regarding whether the Worldwide Church of God has engaged in a pattern of improper conduct. There is no attempt to regulate or in any way become involved in the religious activities or control the financial matters of the church. Nor is there any likelihood that the release of this information will "chill" membership in the church. Thus, we reject the associational rights argument.

675 F.2d at 665.

The present case falls within the discovery rule of *Ambassador College*. Yet, even so, the interest of the Defendants in obtaining the information and documents in question is compelling. The voter registration forms – which, after

all, *are the State's forms*, not the Plaintiffs' private membership lists – show the conduct of the Plaintiffs and the impact of the regulation. They show whether the Plaintiffs really collect forms, whether they copy them voluntarily, whether they modify them, whether they apply and use the “quality control procedures” they have alleged and discussed at length. The other discovery similarly applies. For most of it (quoted and discussed at length in Defendants prior brief) there is not even a colorable associational claim. Nor have Plaintiffs attempted to justify one.

Relying primarily on *Bates v. City of Little Rock*, 361 U.S. 516 (1960), Plaintiffs claim there is a three-part test. (Plaintiffs' brief at pp. 16-23.) While such a test has rarely been followed, regardless, Defendants note, as discussed above and before, the impact of the discovery sought on Plaintiffs' associational rights is *de minimis*. Indeed, Plaintiffs, who admit they have the burden of showing this, put forward no evidence to support their claim their associational rights are impacted. Nor do they discuss or quote any of the written discovery in its particulars (compare Defendants' brief). The Defendants' interest in defending claims against them is compelling, and they are entitled to know the evidence against them or refuting Plaintiffs' claims. U.S. Const. Amend. V, VI.

Plaintiffs are simply not entitled to make allegations without responding to discovery regarding them. Even if associational rights were impacted by the

discovery, Plaintiffs would have waived them for discovery purposes by bringing the issues to the fore in the first place. The days of secret claims are long passed.

D. Defendants' Discovery is Properly Drawn.

Plaintiffs' assertion: "**Defendants' Behemoth Requests for Information Are Irrelevant, Overly Broad, Unduly Burdensome, Harassing, and Duplicative.**" (Plaintiffs' brief at p. 23.)

While making the assertion above, Plaintiffs manage to never quote any of the discovery or discuss any of the individual interrogatories or document requests. Referring to discovery as "behemoth," while colorful, does not address whether it is appropriate.

The fact is, Defendants served almost the same discovery – which was limited in scope – on all of the Plaintiffs. Defendants broke it down by party – which may make it seem like more than it is – to obtain separate verifications, because the Plaintiffs (who are distinct entities, not part of one large entity) may have different answers, and to have the documents separated so that proper questions could then be addressed to them. This does not make the discovery "behemoth" or "irrelevant, overly broad, unduly burdensome, harassing, and duplicative." No individual Plaintiff, for instance, received duplicative requests, though the same requests were sent to different parties.

As to whether the interrogatories and requests are relevant – and whether

they are “overly broad, unduly burdensome, harassing, and duplicative” – must be addressed by looking at the requests one by one. Defendants have done this in their initial brief. As to whether the requests as a whole are proper, the Federal Rules of Civil Procedure govern the scope of discovery, and impose limits such as the number of interrogatories to a party, and Defendants have fully and accurately complied with these.

The Plaintiffs’ responses are non-responses. They are patently evasive and patently ignore the duties that Plaintiffs have as litigants to properly respond.

CONCLUSION

For the foregoing reasons, Plaintiffs should be required to fully answer the interrogatories and document requests upon them, and all fees for litigating this motion to compel should be cast against Plaintiffs. Fed. R. Civ. P. 37.

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SIGNATURE CERTIFICATION

I certify that the originally executed document contains the signatures of all filers indicated herein and therefore represents consent for filing of this document.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the font and point size limitations of LR. 5.1B, ND Ga., and is prepared in Times New Roman 14 point type.

/s/Stefan Ritter
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER** with the Clerk of Court using the CM/ECF system, which will send notification of filing to the following CM/ECF participants:

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This 9th day of July, 2007.

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